

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1530

Cir. Ct. No. 1997FA6

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ED CRUZ,

PETITIONER-APPELLANT,

V.

MARY H. CRUZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
EUGENE A. GASIORKIEWICZ, Judge. *Affirmed in part; reversed in part and
cause remanded.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Ed Cruz appeals from the maintenance portion of a judgment of divorce. He contends the circuit court erred in ruling that a federal benefit plan survivor benefit premium be allocated entirely to him and in prematurely denying his motion to modify or terminate maintenance. We disagree with his first argument and agree with his second. We therefore affirm in part, reverse in part, and remand the cause to the circuit court.

¶2 Ed and Mary Cruz divorced in 1998 after a twenty-three-year marriage. One minor child was still in the home. The court ordered Ed to pay Mary \$750 a month in maintenance until that child's emancipation and \$1000 a month indefinitely afterwards.

¶3 Ed was in the military when the parties married, an immigration officer in the Immigration and Naturalization Service when they divorced, and a Homeland Security special agent when he reached mandatory retirement in 2013. Ed's three federal retirement accounts were divided equally in the 1998 divorce. Only one account, the Federal Employee Retirement System (FERS) plan, is at issue here.

¶4 The equal division of the FERS account required Ed to select a benefit that would provide a "Surviving Spouse Benefit" with Mary as the beneficiary. The marital settlement agreement provided that the court would maintain jurisdiction over the division of the retirement account, allowing any future court to make orders consistent with the agreement. A Qualified Domestic Relations Order (QDRO) drafted consistent with the terms of the settlement agreement requires Ed to maintain the survivor benefit for Mary. The agreement and the QDRO do not address allocating any premium cost. Ed has been paying the survivor benefit premium, currently \$437 a month.

¶5 Ed paid maintenance as ordered until August 2013, when he turned fifty-eight, the mandatory retirement age for federal law enforcement officers. He then moved to terminate or suspend his maintenance obligation until he would be entitled to receive his federal retirement benefits at age sixty.¹ He also moved to allocate the costs of the survivor benefits premium.

¶6 The FERS plan was to go into pay status September 1, 2013. It still had not at the time of the October 23, 2013 hearing on the motion, evidently due to the 2013 government shutdown. Thus, only an estimate of the total benefit rather than definite monthly amounts was available. Ed estimated the final determination could take six to nine months more. The court indicated that it would await further information rather than altering maintenance at that time.

¶7 In November 2013, the court issued a decision assigning the full cost of the survivor benefit to Ed. It found that he agreed to take on that expense, since “he either knew or should have known” at the time of divorce that the survivor benefit would entail a cost.

¶8 As for maintenance, the court found that Ed’s forced retirement constituted a substantial change in circumstances but that it was a long-foreseeable event for which he should have planned, and he also had “numerous and extensive liquid assets” sufficient to satisfy his obligation. The court also found that, through no one’s fault, neither party could provide it at the time of the hearing with specifics of the undetermined FERS distribution; and that, as the distribution

¹ Ed also has a Defense Finance and Accounting Services military retirement (DFAS) and a Federal Thrift Savings Plan (FTSP). Like the FERS plan, the DFAS does not go into pay status until Ed turns sixty in August 2015. The FTSP goes into pay status when he turns seventy and one-half in February 2026.

information was “critical” to its overall determination regarding modification to or continuation of maintenance, it would retain jurisdiction and defer its ruling on the issue “until such time as the Court is provided with actual FERS distribution amounts to the parties.”

¶9 Five months later, on April 1, 2014, the court sua sponte issued a ruling. It found that, as it had not been provided with specific FERS distribution amounts, Ed had failed to meet his burden to show the need to modify the maintenance order. This appeal followed.²

Survivor Benefit Premium

¶10 Ed first argues that, consistent with the parties’ contemplation to divide the retirement accounts equally, the circuit court should have ordered Mary to share the survivor benefit premium cost. Our review of that court’s interpretation of the marital settlement agreement is a question of law, which we decide independently. See *Wagner v. Sobczak*, 2011 WI App 159, ¶7, 338 Wis. 2d 92, 808 N.W.2d 167. Construction of the document is permitted only if it is ambiguous, the determination of which also presents a question of law. *Id.* “The best indication of the parties’ intent is the language of the document itself.” *Id.*

¶11 The marital settlement agreement provides that, by entry of a QDRO, Mary is awarded fifty percent of Ed’s accrued benefit under the FERS

² The parties received the FERS determination in May 2014. Ed was unable to schedule a motion for reconsideration before the deadline for filing an appeal. Filing this appeal precluded the circuit court from entertaining his motion for reconsideration. The FERS plan went into pay status in June 2014.

plan, Ed was required to elect a benefit form that provides a pre- and post-retirement survivor benefit (surviving spouse option), and Mary was the beneficiary of the survivor benefit based on her percentage. The agreement also prohibited Ed from taking any action that could circumvent the QDRO or diminish or extinguish Mary's rights and entitlements under it. It provided that if Ed took "any actions to prevent, decrease or otherwise limit the amounts to be paid to [Mary] ... he shall make the required payments directly to [her] in an amount sufficient to neutralize the effects of such actions taken by [him] to the extent of her full interest under the plan." We conclude that the language of the parties' agreement evinced their intent that Ed take whatever means necessary to ensure that the benefits continue for Mary. Here, that includes paying the premium.

Modification of Maintenance

¶12 Modification of maintenance is committed to the circuit court's discretion. *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶17, 269 Wis. 2d 598, 676 N.W.2d 452. We will sustain a discretionary determination if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be upheld unless clearly erroneous. WIS. STAT. § 805.17(2) (2013-14).³ A circuit court's exercise of discretion is erroneous if it makes factual or legal errors. *Rohde-Giovanni*, 269 Wis. 2d 598, ¶18. The objectives of support and fairness both must be considered when considering modification. *Id.*, ¶31.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶13 The parties do not dispute the circuit court’s finding that Ed made the threshold showing of a substantial change in financial circumstances. *See id.*, ¶30. They part company on the question of whether it erred in denying Ed’s motion to modify maintenance before the specific FERS benefits were known.

¶14 Mary contends the court’s April 2014 decision simply supplemented the decision on maintenance it had made five months earlier. She notes that the court examined the statutory factors, *see* WIS. STAT. § 767.56, and fully considered the parties’ education, health, assets, incomes, and earning capacity.

¶15 Ed argues that the court’s November 2013 discussion of those factors was done in the context of a *potential* modification of maintenance which would be revisited once the FERS payouts were determined. He points out that, in fact, none of the fairness factors formed the basis for the dismissal of his motion.

¶16 We agree with Ed. In its November 2013 decision, the court opined that “fairness demands continuation of the maintenance payments, based on the evidence before this Court *at this time*,” that “through no fault of their own” the parties so far were unable to provide the court with FERS distribution specifics, and that the FERS “distribution information *is critical to this Court’s overall determination* regarding modification to or continuation of maintenance payments in this matter.” (Emphasis added.)

¶17 The court knew the federal government was processing Ed’s application and that Ed estimated a determination would be made in six to nine months, and noted that neither party was at fault for the delay. Nonetheless, five months later, the court ruled that it “will not continue to hold its November 26, 2013 order in limbo” because “the requested FERS distribution amount has yet to materialize.” The court’s decision does not illuminate how a factor it had deemed

“critical” to its overall maintenance decision now could be ignored, the blame laid at the feet of one found to be faultless. We reverse and remand to give the court the opportunity to re-examine the maintenance issue in light of the definite FERS distribution amounts.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

